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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. ~~[illegible]~~ 192

BOARD OF SATANTA JOINT RURAL HIGH SCHOOL DISTRICT No. 2, WILLIAM H. HELTON AND WAYNE LAHEY,
Appellants,

vs.

THE GRANT COUNTY PLANNING BOARD AND ADEL THROCKMORTON, STATE SUPERINTENDENT OF PUBLIC INSTRUCTION,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF KANSAS

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants appeal from a judgment of the Supreme Court of Kansas filed December 11, 1965, affirming a decision of the District Court of Grant County, Kansas; and from a January 6, 1966, order of the Kansas Supreme Court overruling appellants' motion for rehearing. Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The decision of the Supreme Court of Kansas is reported in Volume 195 of the Kansas Reports at page 640. A copy of that opinion and of the opinion of the District Court of Grant County, Kansas, are attached hereto as Appendixes A and B, respectively.

JURISDICTION

Jurisdiction of this Court is conferred by 28 U.S.C., §1257 (2).

QUESTION PRESENTED

Where the legislature has directed that the election process be invoked to determine whether the electors are in favor of, or opposed to a stated proposition, and the result of that election is in favor of the proposition, and a state administrative official is permitted to overrule the majority will duly expressed through the election process—Does a determination that the legislature may invoke the election process to function solely as an advisory device to a state administrative official constitute such an abuse of the election process so as to deny appellants due process of law?

STATUTES INVOLVED

Kansas Statutes Annotated, Article 67 entitled Unified School Districts §72-6734 *et seq.* and, in particular, §72-6743, copies of which are attached hereto as Appendix C.

STATEMENT

This action was filed in the District Court of Grant County, Kansas, on May 28, 1964, on behalf of all of the resident electors of the Satanta Joint Rural High School

District No. 2 of Grant and Haskell Counties, Kansas. (R. 3-9). It was filed against defendant, State Superintendent of Public Instruction, and others, for the purpose of setting aside an order by the Superintendent refusing to abide by the results of an election held pursuant to law. The trial court approved the order and the Supreme Court of Kansas affirmed. This appeal is for the purpose of reviewing the constitutionality of such determination.

At all times material, a portion of the Red Rock Common School District, situated along the eastern edge of Grant County, Kansas, also formed a part of the territory of a joint rural high school district. Section 10 of the Kansas School Unification Act of 1963, K.S.A. 72-6743 denominates such overlapping territory as a "gray-area" and prescribed special procedures with reference to the transfer of such "gray-areas" to a county planning unit. The purpose of the statute is the "general improvement of the public schools in the state of Kansas; the equalization of the benefits and burdens of education throughout the various communities in the state; to expedite the organization of public school districts of the state so as to establish a thorough and uniform system of free public schools throughout the state . . . K.S.A. 72-6734.

With respect to the transfer of such areas, K.S.A. 72-6743 provides that an election be held to determine the desires of the gray-area electors and describes the procedure to be followed in conducting the election. Among other things, the legislature required: (1) that the county school superintendent in which the main high school building is located call a "meeting of the electors of the gray-area"; (2) that notice be given to the resident electors of the gray-area advising them of the time and place of such meeting; (3) that the purpose of the meeting be explained to the resident electors and discussion be held concerning the

matter of transfers; (4) that ballots be distributed to each elector; (5) that each elector present mark his ballot for or against the transfer of the territory; and (6) that each ballot then be returned to the county superintendent and that "he shall count and tabulate the same and thereafter file such ballots in the public records of his office." In short, the Kansas legislature required the invocation of the traditional election process with which each American is familiar.

The statute further provides that in the event that a majority of the electors residing in a particular gray-area are in favor of the transfer of such gray-area to the planning unit where the main rural high school building is located, the two planning boards involved shall consider the advisability of such a transfer. If either one, or both, of the planning boards are in favor of the transfer, "the same *shall be transferred, subject only to the approval thereof by the state superintendent. . . .*"

Prior to the extraordinary action of the superintendent in ignoring the majority will, in this case, it was believed that the approval of the superintendent, referred to, related solely to a determination on his part as to whether such election and attendant procedures had been conducted in a regular, proper and legal manner. This interpretation would, of course, be consistent with due process. (See Appendix B, attached hereto).

Pursuant to K.S.A. 72-6743, a special election was called by the County Superintendent of Schools of Haskell County for September 1, 1963. Notice of the election was posted and publicized. Eighty-five per cent of the resident "gray area" electors attended. The question of transfer to the Grant or Haskell County Planning Unit was publicly debated. Ballots were issued and a secret vote held. A

clear majority of the electors chose to transfer the gray-area to the Haskell County Unit. (R. 4-5).

In accord with K.S.A. 72-6743 the election results were certified to the Haskell and Grant County planning boards. The Haskell County Planning Board adopted a resolution favoring the transfer. The election results and the board resolution were then certified to the State Superintendent of Public Instruction.

There is no question in this case as to the procedural regularity and legality of the election and attendant procedures. But the state superintendent broadly construed the word "approval" as requiring not only (1) a determination by him of the legality and regularity of the election and certification procedures as provided by law (which is admitted), but also as requiring (2) his affirmative personal agreement with the substantive certified result of the secret ballot. Since under such broad construction of the word "approval" he did not approve of the *results* of the election, he issued an order refusing to transfer the gray-area directly contrary to the electoral determination and the concurring resolution of the planning board. (R. 87).

The Superintendent's order was made without notice or hearing. The appellants thus had no opportunity to be heard. On the other hand, information had been solicited by the superintendent from and presented by interested persons from Grant County who opposed the inclusion of the gray-area in the Haskell County planning unit. (R. 87).

Eventually, the State Superintendent did order a limited hearing on the subject of transfer on December 27, 1963. He ruled in advance that there would be no cross-examination of witnesses, that inquiry would not be permitted and that no evidence would be received concerning

the basis of his prior order or possible prejudice on the part of his staff responsible for the order. After this proceeding, the Superintendent remained adamant. (R. 87).

Appellants then filed suit in the District Court of Grant County, Kansas, alleging, among other things, that K.S.A. 72-6743, as applied, constituted a denial of due process of law to appellants. (R. 8). The same objection was raised throughout the administrative proceedings but is not reported, for no record was made. The raising of the constitutional issue presented herein was acknowledged by the Kansas Supreme Court in its opinion, 195 Kan. 64[illegible] (1965), where that court disposed of the question by unequivocally stating that:

> "The petition alleged facts substantially as presented here but embellished with such phrases as 'purported findings of fact', 'star chamber proceedings', 'denial of due process' and 'unlawful usurpation of power'."

That court then approved the broad construction of the term "approval" as meaning that the required elections were "merely advisory" to the Superintendent.

Appellants again raised the same constitutional issue on their motion for rehearing. (R. 92-95).

THE QUESTION IS SUBSTANTIAL

The issue presented by this appeal is whether the legislative use of the election process as a mere public opinion poll or straw vote violates due process of law. So far as we can tell, the question has never been decided by this Court.

Appellant submits that the election process can never be used as a mere advisory mechanism because: (1) elections are by definition determinative of the issue at hand;

(2) "advisory" elections are alien to the concept of a government responsive to the expressed will of its people; and (3) the existence of "determinative" and "advisory" elections side by side can only have the effect of diminishing the active participation of responsible citizens in the elections actually necessary for the existence of our republican form of government at both state and national level.

It is elementary that the Federal Constitution protects the right of all qualified citizens to vote, in state as well as federal elections *Reynolds* v. *Sims*, 377 U.S. 533, 12 L.ed 2d 506, 84 S. Ct. 1362 (1964). It is equally rudimentary that the federal constitution guarantees each voter the right to have his ballot counted, *U.S.* v. *Mosley*, 238 U.S. 383, 59 L.ed 1355, 35 S. Ct. 904 (1915). These basic principles are grounded on the even more fundamental premise that elections are decisive of a given proposition. This is so because it is the people who govern:

> "The very foundation of a true democracy and the foundation upon which this nation was built is the fact that government is responsive to the views of its citizens." *Braden* v. *U. S.*, 365 U.S. 431, 5 L.ed 2d 653 at 661-2 (1961).

> "Under our Constitution it is We the People who are sovereign. The people have the final say. The legislators are their spokesmen. The people determine through their votes the destiny of the nation." *U.S.* v. *U. A. W.*, 352 U.S. 567 at 593 (1957).

The issue is not whether the residents of the gray-areas had the right to vote on the question of transfer. The issue is whether, once vested with that right, the election so held is decisive of the issue. Appellants submit that due process requires an answer in the affirmative. If a qualified citizen has the right to vote and the right to have his vote counted, does he not have the right to

have the election dispose of the issue? For what other reason is an election held if it is not to be determinative of the issue at hand?

"Advisory" elections are repugnant to our form of government, which is based on the concept of government by the people. It is beyond question that the people of this country govern. They are not mere advisors, as held by the Kansas Supreme Court. According to the Declaration of Independence and the Federal Constitution, it is the people who are sovereign and who are the very wellspring of all power. To turn them into mere advisors on public issues is to make the people the servant of government rather than its master.

Take the case at bar. Here the electors participated in the traditional process of free election on a subject of vital interest to them. The majority will was clearly expressed. Nevertheless, it was ignored as "mere advice" and one administrative official was able to overrule the majority will duly expressed through the election process. Is this not precisely the type of situation which the founding fathers sought to prevent? The answer is most assuredly "yes", and this Court now has the opportunity to stop this beginning intrusion of utter disregard for the majority will. Appellants submit that due process so requires.

To permit the existence of "determinative" and "advisory" elections, side-by-side, not only gives impetus to a general erosion of our democratic processes, but also discourages responsible citizen participation in elections required by our Constitutions and without which our republican form of government would not exist.

From childhood through adolescence to maturity, the American citizen is properly and necessarily nourished

on the concept that elections are held to determine how the government will govern. It is taught at home, in church and in school that it is a citizen's highest duty to participate in the election process. It is essential to the Republic that citizens take seriously their right to vote if we are to achieve a government of, by and for the people. Permitting "advisory" and "determinative" elections to exist side-by-side can only lead to confusion and uncertainty.

The situation here is a good example. The legislature directed that the election process, with all of its attendant formalities, be invoked. The electors responded as model citizens. Eighty-five percent of all eligible electors participated in what they quite properly believed to be a traditional democratic decision-making process. They left their homes, farms and places of business at their own expense of time and money. They argued, debated, studied and discussed an issue of vital interest to them —an issue they felt that had been left to their judgment. A secret ballot was taken, the results recorded and a majority view expressed. The electors had exercised their privilege and discharged their duty. But this was an election that turned out to be unlike any election with which they, as American citizens, had been familiar. Instead of deciding the controversy, *it functioned solely as a public opinion poll to advise a single administrative official*!

For this Court to place its stamp of approval upon this type of sham election would result in an attrition of respect for the democratic decision-making process. Who would ever want to vote in a meaningless election, and how would a person ever know with certainty which elections were meaningful and which were not?

It is submitted that the decision of the Kansas Supreme Court is violative of the integrity of the election process by permitting its use as a mere advisory device. Appellants sincerely believe that this question is substantial and of the utmost public importance.

Respectfully submitted,

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APPENDIX A

The opinion of the court was delivered by

Hatcher, C.: This is an appeal from a judgment in a mandamus action refusing to compel the State Superintendent of Public Instruction to issue an order transferring territory under the provisions of the Unified School District Act, K.S.A. 72-6743.

The act provides, insofar as material here, one planning unit for each county (K.S.A. 72-6736) and, recognizing that there were existing school districts extending over county lines, makes provision for the inclusion of such area in a planning unit by K.S.A. 72-6743. The area is designated as "gray-area" and described as follows:

> ". . . any part of a joint rural high-school district which is not . . . located in the same planning unit as the main school building of such joint rural high school is located."

The section then provides the method of determining in which planning unit the gray-area is to be placed. Highly summarized, (1) a meeting of the electors of the gray-area is to be called by the county superintendent of the county in which the main school building is located, (2) each elector present is to mark a ballot for or against the transfer of the territory, (3) if a majority favor the transfer the county superintendent shall so certify to the chairman of the planning units interested, and (4) the two planning boards involved shall then consider the advisability of such transfer. The section concludes:

". . . If either one or both of such planning boards are in favor of such transfer, the same shall be transferred, subject only to the approval thereof by the state superintendent as hereinafter provided. The chairman of each of such planning boards shall promptly, and prior to October 5, 1963, report to the state superintendent the result of the vote taken in each gray-area and the desire of his planning board with respect to such transfer. Upon the receipt of any such report *the state superintendent shall determine whether such gray-area shall be transferred from one planning unit to the other,* and shall promptly issue an order transferring the same or refusing to transfer the same. *Such determination by the state superintendent shall be conclusive,* and upon issuance of his order for any transfer under the provisions of this section, such gray-area shall be included in and be a part of the planning unit to which it is transferred by such order." (K.S.A. 72-6743. Emphasis supplied).

Such a gray-area existed at the eastern edge of Grant County, comprising some fifteen sections of land. This gray-area formed a part of the territory of Joint Rural High School District No. 2, which had its school building at Satanta, Haskell County, Kansas. The gray-area also formed a part of the Red Rock Common School District and all of its territory was located in Grant County. The statutory procedure for determining to which planning unit the area would be attached was duly commenced. Eighty-five percent of the electors in the gray-area cast ballots resulting in 52 votes being cast in favor of the transfer of the territory to the Haskell County Planning Unit and 44 opposed.

Following the completion of the statutory procedure the Haskell County Planning Board reported to the state superintendent its approval of the transfer of the gray-area to the Haskell County Planning Unit and the Grant County Planning Board reported its opposition.

On November 27, 1963, the state superintendent issued an order denying the transfer of the territory in the gray-area in which he concluded:

> "Wherefore, it is hereby determined that the above described gray-area should not be transferred from the Grant County planning unit to the Haskell County planning unit and such transfer is hereby refused and such gray-area territory shall remain in the Grant County planning unit."

The order stated the source of the information on which it was based:

> "Now, therefore, After considering all of the information, facts, arguments, letters, forms, maps, and evidence of every kind concerning the below described gray-area from the staff of the state superintendent and from the county superintendents, school officials, residents, and interested persons in and of Haskell County and in and of Grant County, the state superintendent finds the following to be true:"

The order set out the assessed valuation of the disputed area and the school districts affected; gave the distance to the various school buildings from the gray-area, and stated specific and controlling reasons for the order refusing the transfer as follows:

> "The Red Rock School is located on the main highway between Ulysses and Satanta as is the described residential area; the Red Rock School is an 11 teacher elementary school with a school plant which has been built within the past 15 years and which cost in excess of $200,000; it has complete facilities including music, physical training, hot lunches, bus transportation, and kindergarten; the Red Rock School will accommodate more than 180 students; the elementary students living in the gray-area constitute 39% of the present enrollment of the Red Rock School; there are no other

convenient areas outside of its district from which this school might draw replacement students; the Red Rock Elementary School is a good elementary school which offers its students and the community one of the better educational institutions of its type in the state of Kansas. A sudden decrease of 39% in enrollment would materially impair the efficiency, quality and standing of the Red Rock School; transportation of the 55 elementary school children in this gray-area a distance of about 25 miles every day would be expensive, inconvenient and educationally unsound when good school facilities are available at a distance of 2 miles."

The above order was issued without notice and without a formal hearing giving the interested parties an opportunity to be heard.

Certain interested parties petitioned the state superintendent for a hearing. On December 27, 1963, the state superintendent issued an order for a hearing to be held on January 7, 1964, in the House of Representatives at the State House. The order laid down rather restrictive "ground rules." Each side was given one hour to present its case and one-half hour for rebuttal. No cross-examination was permitted but each side could ask the other questions during the rebuttal period. The chairman of the planning board of each county was to control each delegation and determine who was to speak and when.

On June 16, 1964, following the hearing as above provided, the state superintendent issued a second order ratifying and confirming his previous order of November 27, 1963. It does not appear that this last order was before the district court at the time of the hearing.

On May 28, 1964, Joint Rural High School District No. 2 and two taxpayers interested in the gray-area brought this action to enjoin the Grant County Planning Board

from forming a unified school district with the gray-area included, and to compel the state superintendent to transfer the gray-area to the Haskell County Planning Unit.

The petition alleged facts substantially as presented here but embellished with such phrases as "purported findings of fact," "star chamber proceedings," "denial of due process" and "unlawful usurpation of power." A motion for a temporary restraining order was denied and defendants filed a motion to dismiss, stating among other grounds failure to state a claim upon which relief can be granted.

The motion to dismiss was heard July 1, 1964, at which time the parties by stipulation introduced evidence of a copy of the orders of the state superintendent dated November 27, 1963, a copy of the hearing order dated December 27, 1963, a plat showing the territory involved, and agreed that the first eight paragraphs of plaintiffs' petition were a correct statement of the facts.

The trial court overruled the motion to dismiss stating:

> ". . . Consequently, since the stipulation by the parties as to the facts, together with the introduction of the stipulated exhibits, require a determination, this Court considers the same as a motion for summary judgment."

The court made findings of fact and conclusions of law and rendered judgment for the defendants.

Plaintiffs have appealed. They first contend that the trial court erred in entering summary judgment because appellants' petition presented genuine issues as to material facts which were not controverted.

The above contention will be more readily disposed of if we first consider the second contention, which goes to the merits. Appellants ask:

"Does K.S.A. 72-6743 authorize the State Superintendent of Schools to ignore and set aside the majority vote of the resident electors of a gray-area as to the inclusion of such area in an authorized planning unit under the 1963 School Unification Act? If so, is such provision unconstitutional?"

Appellants' entire argument is based on the fallacious assumption that the legislature could not delegate to the state superintendent absolute authority to establish school district boundaries where the majority of the electors had voted to the contrary.

We find no merit in appellants' contention that the legislature did not by K.S.A. 72-6743 authorize the state superintendent to refuse to transfer territory after a majority of the electors in the area had voted in favor of the transfer.

The statute (K.S.A. 72-6743) is clear and unambiguous. It provides that if a majority of the electors in a gray-area vote in favor of transferring the territory—

". . . If either one or both of such planning boards are in favor of such transfer, the same shall be transferred, *subject only to the approval thereof by the state superintendent* as hereinafter provided. . . ." (Emphasis supplied).

It appears from the above quoted provision that the vote of the electors and the approval of one or both of the planning boards is subject to the approval of the state superintendent.

The section further provides:

". . . Upon the receipt of any such report the *state superintendent shall determine* whether such gray-area shall be transferred from one planning unit to the other, and shall promptly issue an order transferring

the same or refusing to transfer the same. *Such determination by the state superintendent shall be conclusive,* . . ." (Emphasis supplied).

We do not know how the legislature could have made it clearer that the state superintendent shall determine whether the gray-area shall be transferred and his determination shall be conclusive.

The legislature was no doubt attempting to avoid the rule announced in numerous decisions by this court prohibiting the delegation of legislative authority to determine boundary lines for governmental subdivisions. A consideration of a few of these decisions will tend to disclose the fallacy of appellants' contention that the result of the election by the electors in the area is conclusive.

In the School Reorganization Act of 1945, where the legislature sought to create in each county of the state a school reorganization committee it granted to the county reorganization committee (G.S., 1945 Supp., 72-5607) the power and authority to reorganize the school districts of the county. The School Reorganization Act of 1945 also provided for hearings and provided for a review by the District Court. This court held that law to be unconstitutional in *State ex rel.* v. *Hines,* 163 Kan. 300, 182 P.2d 865, and held:

"Legislative powers, as distinguished from administrative, cannot be delegated unless there is constitutional sanction therefor. There is no provision in the constitution of Kansas authorizing the legislature to vest in school reorganization committees the power to make legislative regulations concerning the establishment of school districts.

"The establishment of a uniform system of schools is not a subject of 'local legislation' which can be con-

ferred upon 'tribunals transacting the county business' under section 21 of article 2 of the constitution of Kansas." (Syl. 2 and 3).

In *State ex rel.* v. *School District,* 140 Kan. 171, 34 P.2d 102, this court, in considering a statute permitting a landowner to withdraw from a school district by petition to the county superintendent, stated:

> "Every annexation of land to or exclusion of land from the corporate limits of a municipal or quasi-municipal organization is to that extent a reorganization, and it is not debatable that the legislature is powerless to clothe a private individual or a group of private individuals with power over corporate organization. An attempt to confer such power is said to be an attempt to delegate legislative power, which is futile. This is settled by a long line of decisions, beginning with *Comm'rs of Wyandotte Co.* v. *Abbott,* 52 Kan. 148, 34 Pac. 416, and extending to *Barrett* v. *City of Osawatomie,* 131 Kan. 50, 289 Pac. 970. . . ." (p. 174).

See, also, *Comm'rs of Wyandotte Co.* v. *Abbott,* 52 Kan. 148, 34 Pac. 416, at page 166, where the following language is found:

> ". . . Even if the legislature has the power to confer an authority or discretion as to the execution of such a statute as Chapter 214, it ought not to have the power, and we do not think it has the power, to confer an authority or discretion as to the execution of such a statute upon the resident landholders of a special and small taxing district, when other districts and other taxpayers are interested, and must bear a part of the burden of the improvement or special assessment. . . ."

In the case of *Hutchinson* v. *Leimbach,* 68 Kan. 37, 74 Pac. 598, the constitutionality of a law permitting a city of the second class to enlarge the limits from territory adjacent to the city was in question. The court held that an ordinance was an unconstitutional delegation of legislative power and said at page 46:

". . . Under the provisions of the act the will that the corporate boundaries shall be changed proceeds not from the legislature or from the council, but from the signers of the petition, who are under no official responsibility, and of whom no other qualification is required than that they desire the change. These provisions are therefore void."

In the recent case of *School District, Joint No. 71* v. *Throckmorton,* 189 Kan. 590, 370 P.2d 89, this court considering the constitutionality of the 1961 Unified School District Act held:

"The Unified School District Act (G.S. 1961 Supp. 72-6701 *et seq.*) is considered and found to be unconstitutional in that it contains invalid delegation of legislative power and violates the state constitution in certain other ways as more fully explained in the opinion." (Syl.).

It should be noted that in the cases just considered we were not called upon to determine the constitutionality of delegated authority where the legislature had laid down policies and standards as a guide to the exercise of the delegated authority. Although there may be constitutional prohibitions or lack of constitutional authority to delegate legislative power; the legislature is not denied the necessary flexibility and practicality which will enable it to perform its functions by delegating to select instrumentalities some of the legislature's functions where the policy is fixed and standards are definitely established which determine the manner and circumstances of the exercise of such power. (*Johnson* v. *Reno County Comm'rs,* 147 Kan. 211, 75 P.2d 849; *Ritchie* v. *Johnson,* 158 Kan. 103, 144 P.2d 925; *State ex rel.* v. *Fadely,* 180 Kan. 652, 308 P.2d 537.) What constitutes adequate standards will of necessity depend upon the nature of the power delegated in each particular case and the constitutional grants or prohibitions pertaining thereto.

Neither is there any merit to appellants' contention that the granting of authority to the state superintendent to refuse to approve the transfer after the approval by a majority of the electors in the area is in violation of sections 1 and 21 of article 2 of our constitution.

The vote of the electors is merely advisory under the statute as is the approval of the planning boards. The electors have no vested right in school boundaries, nor does such right vest after they have exercised their vote in connection therewith. The legislature may use the vote of the electors in such advisory capacity as it sees fit, either for its consideration in fixing school boundaries or for the consideration of the instrumentality to whom the authority is properly delegated.

The people have by their constitution divested themselves of all control over school boundaries and placed such authority in the hands of the legislature.

The people have also by their constitution placed the responsibility for the general supervision of the educational interests of the state in the state superintendent. He is, therefore, the logical officer to be delegated legislative authority in connection with school matters.

This issue has been fully covered by this court and it would serve no useful purpose to extend the argument further than was done in *State ex rel.* v. *Storey,* 144 Kan. 311, 58 P.2d 1051. In the Storey case the court had under consideration a contention that because the state superintendent is an administrative officer the legislature could not confer legislative authority upon him. We stated, beginning at page 316 of the opinion:

> ". . . Forceful as this argument is, it overlooks article 6 of our constitution dealing specifically with education, the pertinent portions of which read:

" 'The legislature shall encourage the promotion of intellectual, moral, scientific and agricultural improvement by establishing a uniform system of common schools, and schools of a higher grade, embracing normal, preparatory, collegiate and university departments.' (Art. 6, § 2).

" 'The state superintendent of public instruction shall have the general supervision of the . . . educational interests of the state, and perform such other duties as may be prescribed by law. . . .' (Art. 6, § 1).

"By these provisions of the constitution the legislature was required to establish a uniform system of common schools and schools of a higher grade. Realizing that many questions pertaining to educational matters naturally would arise, and which would need the attention of a competent official who could investigate and determine what is best to be done, our constitution gave to the superintendent of public instruction 'the general supervision of the . . . educational interests of the state,' and specifically authorized him to 'perform such other duties as may be prescribed by law,' without limiting those duties to such as might be classified as executive or administrative only. He is authorized to perform any duties pertaining to the educational interests of the state which the legislature deems wise and prudent to impose upon him. Under these provisions it cannot be said that the legislature is without authority to authorize the state superintendent of public instruction to perform duties, or determine questions, with respect to the educational interests of the state which, in the general classification of powers of government, would be regarded as legislative in character."

The same rule was followed in *State ex rel.* v. *Brooks*, 160 Kan. 526, 163 P.2d 414, and it was stated: "The state superintendent is better equipped to ascertain what is good for the particular school district than a court would be."

What has been said also disposes of appellants' contention that the trial court erroneously disposed of the case on summary judgment. The facts alleged in the petition and stipulated into the record at the hearing left no genuine issue of material fact in controversy on the question of whether the state superintendent's actions were within the purview of the Unified School District Act. The Act laid down on standards to control the manner in which the state superintendent would obtain the facts and information which would govern his discretion in granting or denying transfer of the gray-area. In *Brick* v. *City of Wichita,* 195 Kan. 206, 403 P.2d 964, we held:

> "Where a motion for summary judgment is sought, the provisions of K.S.A. 60-256 (*c*) authorize the judgment to be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Syl. 1).

The steps taken by the state superintendent, being in harmony with the statute which we have held to be constitutional (*Tecumseh School District* v. *Throckmorton,* 195 Kan. 144, 403 P.2d 102), cannot be made the subject of a charge of unlawful and arbitrary conduct.

The judgment is affirmed.

Approved by the Court.

Parker, C. J., not participating.

APPENDIX B

Findings of Fact and Conclusions of Law

(Filed September 2, 1964)

On May 28, 1964, the plaintiffs filed this action to enjoin the defendants from the continuance or performance of any act or procedure which would result in the formation of the unified school district contemplated by the plan of the Grant County Planning Board and at the same time filed an application for a restraining order. A hearing on the temporary restraining order was held at Ulysses, Kansas, on June 1, 1964, with plaintiffs and defendants each appearing with counsel. The Court after hearing argument denied the temporary restraining order on the grounds that a hearing or trial of the case in chief would accomplish essentially the same results as the restraining order and that the position of the plaintiffs would not be affected by such denial.

The defendants filed motions to dismiss for the following four reasons:

1. Lack of jurisdiction over the subject matter;
2. Improper venue;
3. Failure to state a claim upon which relief can be granted; and
4. Failure to join an indispensable party.

On the first day of July, 1964, the hearing was held at Ulysses with the plaintiffs and defendants each appearing by counsel. The parties by stipulation introduced the following documents into evidence:

(a) Copy of an order dated November 27, 1963, by Adel F. Throckmorton, State Superintendent of Public Instruction, refusing to transfer the grey area from Grant County Planning Unit to Haskell County Planning Unit, (b) a copy of the order made by said State Superintendent on June 16, 1964, ratifying and confirming his order of November 27, 1963, (c) a copy of an order of hearing, by said State Superintendent, dated December 27, 1963, setting a hearing on January 7, 1964, and (d) a plat showing the territory involved in this action.

The defendants agreed that the first eight paragraphs of the plaintiffs' petition was a correct statement of the facts and is the basis for this action. No further evidence was introduced and after argument by counsel the case was submitted to this court, presumably upon the defendants' motions to dismiss.

The four grounds alleged in said motion are tantamount to a demurrer to the plaintiffs' petition and when treated as such should be, under our present code of civil procedure, overruled. Consequently, since the stipulation by the parties as to the facts, together with the introduction of the stipulated exhibits, require a determination, this Court considers the same as a motion for summary judgment.

The plaintiffs asked for an order of mandamus compelling the State Superintendent of Public Instruction to transfer said Red Rock Grey Area to the Haskell County Planning Unit which this Court denies on the grounds that the plaintiffs have no authority to maintain this action in mandamus.

The plaintiffs also asked that the defendants and each of them be enjoined from proceeding to carry out the uni-

fication plans of the Grant County Planning Unit. The grounds alleged can properly be divided into two categories, to wit:

1. That section 10 of Chapter 393 of the 1963 session laws of Kansas makes it mandatory upon the State Superintendent of Public Instruction to transfer the disputed "grey area" to the Haskell County Planning Board since a majority of the resident electors voted for such transfer and the Haskell County Planning Board designated its favor of such transfer.

Plaintiffs argue that if the act does not grant ministerial powers only and thus makes it mandatory on the state superintendent to make the transfer but grants him discretionary powers then said act provides for an unconstitutional delegation of legislative powers. It also nullifies the provision for the election by the resident electors of the grey-area and the adoption of the election results by the Haskell Planning Board.

2. However, if the State Superintendent has such discretionary powers, then the order refusing such transfer should be set aside as being malicious, arbitrary, capricious and therefore unlawful.

3. The legislature, as set out in Section 3, Chapter 393, of the 1963 Session Laws seem to clearly place the grey area in this instance with the Grant County Planning Board as a proper and constitutional act.

Section 10 of said act in effect sets out the following procedural steps to be used in making transfers of Grey Area Territory, to wit:

(a) a majority vote of the resident electors of the grey area territory favoring a transfer, the vote in this case was 52 to 44 favoring the transfer;

(b) the adoption thereof by one or both planning boards (in the instant case the adoption was made by the Haskell County Planning Board) and that the transfer shall be made;

(c) "subject to the approval thereof by the State Superintendent as hereinafter provided. The chairman of each of such planning boards shall promptly, and prior to October 5, 1963, report to the State Superintendent the result of the vote taken in each grey area and the desire of his planning board with respect to such transfer. Upon the receipt of any such report the State Superintendent shall determine whether any such grey-area shall be transferred from one planning unit to the other, and shall promptly issue an order transferring the same or refusing to transfer the same. Such decision by the State Superintendent shall be conclusive. . . ."

Prior unification acts passed by the Kansas Legislature, attempting to accomplish unification of school districts have by the Supreme Court been declared unconstitutional. The case of State ex rel. v. Hinds, 163 Kansas 301, declaring a prior act unconstitutional holds that a delegation of powers to school re-organization committees not mentioned in the constitution are improper and unconstitutional as a delegation of legislative powers, but suggests that a delegation of legislative or discretionary powers to the State Superintendent of Public Instruction, the same being a constitutional office, would be constitutional. In the case of State ex rel. v. Brooks, 160 Kansas 526, which interpreted a statute similar to the statute involved herein, the Court held the delegation of discretionary powers by the legislature to the State Superintendent to be proper and constitutional. This Court thinks that this act comes within the rules set out in the above cited cases.

The above disposes of this law suit except as to category No. (2), the allegations contained in Paragraphs 9 to 25 inclusively, as the defendants contend, fail to state and allege a cause of action. Defendants cite State ex rel. v. Brooks, 160 Kansas 526, to the effect that any acts of a state official such as State Superintendent of Public Instruction cannot be questioned unless allegations are made that the acts of such officer are actuated with malice, or arbitrariness or amount to capricious conduct on the part of the said State official. An examination of plaintiffs' petition discloses that the petition does not use any of the above enumerated words, however, this court thinks that such words are words of conclusion. The test is not whether such words are actually used in the petition but whether the acts of the State Superintendent as alleged and described in the petition are of themselves malicious, arbitrary or capricious. In said 17 paragraphs of the plaintiffs' petition, being paragraphs 9 to 25 inclusively, allegations of erroneous conclusions of law together with unlawful actions by the State Superintendent are alleged. Inasmuch as the Court has heretofore ruled that such conclusions of law were not erroneous it goes without saying that such allegations cannot be considered as malicious, arbitrary or capricious. This would include the allegations that the State Superintendent, although required by law to do so, ignored the vote of the electors residing in the grey-area and the action of the Haskell County Planning Board. This eliminates all of the allegations in the petition as to malice, capriciousness and arbitrariness except those allegations contained in paragraphs 10, 15 and 17 of the petition to the effect that the State Superintendent received evidence from and talked to persons in favor of the grey-area being retained by the Grant County Planning Board and failed and re-

fused to give the plaintiffs an opportunity to be heard and refute the testimony presented in favor of the Grant County Planning Board. This Court thinks that when such allegations are construed with the order of hearing issued by the State Superintendent of Public Instruction on the 27th day of December, 1963, providing for a hearing to be held in the House of Representatives on January 7, 1964, at which hearing the plaintiffs with counsel admitted they attended, this court concludes that such allegations, so construed with such exhibit, do not constitute malicious, arbitrary or capricious conduct on the part of the State Superintendent. Therefore, plaintiffs' application for injunction will be denied.

Summary judgment for the defendants will be rendered at Ulysses on the 2nd day of September, 1964, in accordance with these findings.

/s/ L. L. Morgan
Judge

Recorded in Journal 9, pages 325-326.

APPENDIX C

Kansas Statutes Annotated

Article 67.—UNIFIED SCHOOL DISTRICTS ACT OF 1961

72-6734. Legislative declaration, liberal construction. The legislature hereby declares that this act is passed for the general improvement of the public schools in the state of Kansas; the equalization of the benefits and burdens of education throughout the various communities in the state; to expedite the organization of public school districts of the state so as to establish a thorough and uniform system of free public schools throughout the state whereby all areas of the state are included in school districts which maintain grades one (1) through twelve (12), and kindergarten where desired; and to have a wiser use of public funds expended for the support of the public school system of the state. To these ends this act shall be liberally construed. [L. 1963, ch. 393, § 1; May 15.]

72-6735. Definitions. As used in this act, unless the context otherwise requires:

(1) The term "state superintendent" means the state superintendent of public instruction.

(2) The term "county superintendent" means county superintendent of public instruction.

(3) The term "planning unit" means one of the primary units of organization that the territory of the state is divided into by this act for the purpose and function of planning the territorial extent and boundaries of proposed unified districts of the state, with every planning unit

being under the general supervision of the state superintendent, and the functions of each planning unit being independently administered locally under authority conferred by this act upon one individual planning board for each planning unit.

(4) The term "home. county" means: (*a*) as applied to a planning unit or planning board, the particular county with which a particular planning unit, or planning board, is principally associated and mainly related in territory and residents, such that more than one-half of the area of such particular county is included in such particular planning unit; and (*b*) as applied to unified districts, the county designated by the state superintendent in his organization order as the home county of the unified district; and (*c*) as applied to a proposed unified district, the county so designated in recommendations unconditionally approved by the state superintendent.

(5) The term "planning board" means one of the six member administrative bodies provided to be established by this act, upon which this act imposes certain planning duties and functions and confers authority to carry out such planning.

(6) The word "board" means one of the unified school district boards of education provided for by this act and such board being the governing body of a unified district.

(7) The term "unified district" means a school district organized under the authority of this act.

(8) The term "city district" means the school district of a board of education of a city of the first or second class.

(9) The term "boards of city districts" means boards of education of cities of the first and second class.

(10) The term "board of the city district" means the board of education of a city of the first or second class.

(11) The term "selection committee" means one of the organizational bodies provided to be established by this act, and the sole function of each such body being the selection of all or part of the members of the planning board for the planning unit of such selection committee.

(12) The term "disorganized district" means any school district of any type disorganized pursuant to this act. [L. 1963, ch. 393, § 2; May 15.]

72-6736. Planning units; territorial extent; board; Shawnee Mission declared urban area. (*a*) All of the territory of the state is hereby divided into one hundred and six (106) planning units such that there is one planning unit for each county in the state except Johnson which shall have two (2) planning units, one (1) of which shall be comprised of the territory of rural high-school district No. 6 (Shawnee Mission) and the other of which shall be the territory which, under the provisions of this act, comprises the planning unit of Johnson county except for said rural high-school district No. 6. Each planning unit shall consist of the following: (1) All of the territory within every common-school district, the main school building of which is located in the home county of such planning unit unless such common-school district has more than one main school building, in which case the provisions next following shall apply, and (2) all of the territory within every common-school district which has more than one main school building and the greater part of the territory of which is in the home county of such planning unit, and (3) all of the territory within every city

district of such home county, and (4) all of the territory in such home county that is not in any common-school district. An individual planning board shall be selected for each planning unit. Each planning board shall have authority over and responsibility for the planning unit of residence of the members of such planning board, and such authority and responsibility shall be for the purposes, functions, duties and period specified in this act. The members of each planning board shall be selected and each planning board shall be constituted as provided in this act.

(*b*) The territory comprising (Shawnee Mission) rural high-school district No. 6 of Johnson county, Kansas, is hereby designated and declared to be an urban area for the purposes of this act. [L. 1963, ch. 393, § 3; May 15.]

72-6737. Selection committee of planning unit; membership; certification; duties of county superintendent; first meeting; chairman and secretary; certification of selection of members of planning board. On or before June 1, 1963, the boards of school districts of every type, all or the greatest part of the territory of which is located within each individual planning unit, except board of city districts shall each select one of its members to serve as a member of the selection committee of the planning unit. The clerk of each such board shall certify the name and mailing address of the members so selected to the county superintendent of the home county of the planning unit. On or before June 4, 1963, each such county superintendent shall compile a list of names of members so certified, and the persons named on such list shall comprise the selection committee for such planning unit.

Each selection committee shall meet on or before June 15, 1963, to make the selections herein provided. Each

county superintendent shall call the first meeting of his selection committee, stating the time and place of such meeting in a written notice thereof, which he shall mail to each member on such list at least two (2) days prior to such meeting.

The county superintendent of the home county of the selection committee shall be an ex officio member of the selection committee, without vote, and shall serve as secretary of the selection committee. Each selection committee shall elect one of its members chairman. Such chairman shall serve until the duties of the selection committee are completed. After the selection committee has made its selections, the names of the members of the planning board selected by such selection committee shall be certified by the county superintendent to the state superintendent no later than two (2) days after the date of the selection committee meeting. Boards of city districts shall certify the names of the planning board members selected by them to the state superintendent within two (2) days after such selections are made. [L. 1963, ch. 393, § 4; May 15.]

72-6738. Planning boards; composition; selection; qualifications. (*a*) Where there is no city district in a planning unit, the selection committee of such planning unit shall select six (6) persons who are resident electors of the planning unit to be members of the planning board of such planning unit as provided in subsection (*e*) of this section.

(*b*) If there is one and only one city district in a planning unit, the planning board of such planning unit shall have six (6) members selected as follows: The selection committee shall choose three (3) persons who are resident electors of the planning unit but who reside

outside of such city district, and the board of such city district shall choose three (3) members, who are resident electors of the planning unit and who reside inside of such city district.

(c) If there are two (2) or more city districts in a planning unit, the planning board of such planning unit shall have six (6) members selected as follows: The county superintendent shall call a meeting of the boards of city districts in the planning unit. Such boards shall jointly select three (3) members who are resident electors of such city districts, and the selection committee shall select three (3) members, who are resident electors of the planning unit but who reside outside of such city districts.

(d) Selections to be made by boards of city districts shall be made on or before June 15, 1963.

(e) If there is no city district in the planning unit, the selection committee shall choose (1) three persons each of whom resides and owns real property within a third class city or a second class city not having a board of education, and (2) three members who reside outside of such cities.

(f) In any planning unit over half of the territory of which is comprised of school districts organized pursuant to section 72-6608 of the General Statutes Supplement of 1961 *et seq.*, the members of the planning board from city districts shall be chosen as above provided, and the three members not from city districts shall be selected as follows: Each board of education of a district organized pursuant to said section 72-6608 shall appoint one member to the planning board.

(g) No planning board member shall be an employee of any school board and none shall be an elective official of any city, county or the state. [L. 1963, ch. 393, §5; May 15.]

72-6739. Filling vacancies on planning board. In the event of resignation, death or other disqualification of a planning board member, who was selected by a selection committee, the chairman of the selection committee shall recall the selection committee and select a properly qualified member to fill such vacancy. In the event of resignation, death or other disqualification of a planning board member who was selected by one or more boards of city districts, then, the board or boards who selected such member shall select a properly qualified member to fill such vacancy. [L. 1963, ch. 393, § 6; May 15.]

72-6740. Failure to select planning board members; duty of state superintendent. In the event that a duly constituted planning board has not been selected in any planning unit by July 1, 1963, the state superintendent shall select and appoint members of the planning board as follows: (1) If neither the selection committee nor the city boards of a planning unit have duly selected members of the planning board, then, the state superintendent shall select and appoint any six (6) persons who qualify as provided in section 5 [72-6738] of this act to be members of such planning board or, (2) if the selection committee has duly selected members for the planning board but the city board or boards in such planning unit have failed to make their selections, or if the city board or boards have duly selected members for the planning board but the selection committee has failed to make its selections, then in either event the state superintendent shall appoint persons who qualify as provided in section 5 [72-6738] of this act to be

members of such planning board in lieu of the members who should have been selected but were not. [L. 1963, ch. 393, § 7; May 15.]

72-6741. Organization of planning board; meetings; funds; increase in compensation of county superintendent, when; state participation. Each planning board shall hold its first meeting on or before July 3, 1963. The planning board shall elect one of its members to be chairman and another member to be vice-chairman. Place and time of later meetings and other business of such board shall be determined and conducted as such board deems proper, so long as the board actions do not conflict with this act, and so long as the board performs the duties directed by this act.

The county superintendent of the home county of the planning board shall serve as its secretary and shall perform such duties as it directs. The board of county commissioners of the home county of the planning board shall provide funds for the planning board in accordance with the reasonable requests of the planning board. Such funds shall be used for attorney fees, office expense, clerk and secretarial hire, travel and subsistence expense, and for postage and miscellaneous expenses of the planning board, within the financial limits provided by the board of county commissioners of the home county. Commencing on July 1, 1963, the salary of each county superintendent shall be increased in the amount of twenty dollars ($20) per month for a period to end when the reorganization needs are substantially ended as hereinafter provided, but such period shall not exceed two (2) years. Such expenditures of the planning board and election expenses paid by the county as provided for in this act shall be paid from the general fund of the home county and shall be vouchered and paid as other county expenses, except that the pro-

visions of the budget law of the state shall not apply to such expenditures made in the year 1963. Fifty percent (50%) of the total amount so paid each month from the county general fund shall be reimbursed out of funds appropriated therefor in the state treasury. The state controller is hereby authorized to draw his warrants therefor on the state treasurer payable to the county treasurers of the proper counties for such reimbursements upon the presentation of duly itemized and verified vouchers of the various boards of county commissioners. Upon receipt thereof the county treasurers shall credit the same to the county general fund.

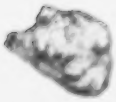
The state superintendent shall keep himself informed of the reorganization financial needs of each of the county superintendents' offices of the state. When such needs, including disorganization needs, are substantially ended the state superintendent shall so advise the board of county commissioners, and no expenditures made after such date shall qualify for state financial participation under this section. [L. 1963, ch. 393, § 8; May 15.]

72-6742. Planning board recommendations; listing and summary; hearing requirements; duties of state superintendent. Each planning board, in formulating its recommendation to the state superintendent for territorial extent and boundaries of unified districts as herein provided, shall complete a study which shall consist of the following: Such board shall make a listing of the types of school districts in its planning unit which listing shall show for each, the school enrollments, enrollment trends, educational program offerings at kindergarten, elementary and secondary grade levels including special services in areas of health, physical education, music, art, special education programs, vocational and trade courses, and counseling and

guidance services. Such board shall prepare a summary explaining the most important facts concerning utilization of school facilities, financial data relating to assessed valuation, assessment ratios, mill levies for school purposes, bonded indebtedness, capital investment, school transportation including bus routes, roads, number of students transported, and terrain and topography of the planning unit, as such matters exist in the planning unit. The list and summary to be made pursuant to this section shall constitute a public document and shall be made available to residents of the planning unit on or before January 1, 1964.

The hearings required by section 11 [72-6744] of this act are expected to be informative to the members of the planning board, and should be conducted in an orderly and studious manner. Each planning board is directed to give careful attention to social and economic characteristics and needs of areas and groups of people along the boundaries of the planning unit. Each planning board should conduct hearings in such a way that there is ample opportunity for the planning board members to become advised of such characteristics and needs. The list and summary provided for in this section should reflect the information so derived. Such list and summary shall accompany the recommendations of the planning board when submitted to the state superintendent.

The state superintendent and his staff shall aid, advise and assist each planning board in the performance of its study duties by furnishing literature suggesting procedures, methods, forms, diagrams or maps and any other necessary or suitable materials for such study; and by providing consultation services to the extent practicable, within appropriations made therefor by the legislature. [L. 1963, ch. 393, §9; May 15.]



72-6743. Gray-area territory; transfers; elections; approval by planning board or boards and by state superintendent; order by state superintendent. As used in this section, the term "gray-area" means any part of a joint rural high-school district which is not (under the provisions of section 3 [72-6736] of this act) located in the same planning unit as the main school building of such joint rural high-school is located.

On or before October 1, 1963, there shall be held a meeting of the electors residing in each gray-area in the state. At least ten (10) days prior to any such meeting the county superintendent of the county in which such a main school building is located shall post notices in three conspicuous places in each gray-area, notifying the resident electors of such gray-area of the time and place of such meeting. The purpose of each such meeting shall be to determine whether it is the desire of such electors that such gray-area be transferred from the planning unit in which such gray-area is located to the planning unit in which the main school build- such rural high-school district is located.county sup ing of such rural high-school district is located. Such county superintendent shall attend each such meeting and serve as chairman thereof. He shall explain to the persons present the purposes of the meeting and permit discussion by interested persons. After such explanation and discussion, the county superintendent shall distribute one (1) ballot to each such elector residing in such gray-area who is in attendance at such meeting. Such ballots shall be prepared so that such elector may vote in favor of transfer of such territory or against transfer of such territory. Each ballot shall then be returned to the county superintendent, and he shall count and tabulate the same and thereafter file such ballots in the public records of his office. If a majority of such ballots in any particular gray-area are

in favor of the transfer of such territory, the county superintendent shall so declare and certify such fact to the chairman of the planning units involved.

Upon receipt of a certification that a majority of the electors residing in a particular gray-area are in favor of the transfer of such gray-area to the planning unit where the rural high-school building is located, the two planning boards involved shall consider the advisability of such transfer. If either one or both of such planning boards are in favor of such transfer, the same shall be transferred, subject only to the approval thereof by the state superintendent as hereinafter provided. The chairman of each of such planning boards shall promptly, and prior to October 5, 1963, report to the state superintendent the result of the vote taken in each gray-area and the desire of his planning board with respect to such transfer. Upon the receipt of any such report the state superintendent shall determine whether such gray-area shall be transferred from one planning unit to the other, and shall promptly issue an order transferring the same or refusing to transfer the same. Such determination by the state superintendent shall be conclusive, and upon issuance of his order for any transfer under the provisions of this section, such gray-area shall be included in and be a part of the planning unit to which it is transferred by such order. [L. 1963, ch. 393, §10; May 15.]

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JUN 25 1966
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. [redacted] 192

BOARD OF SATANTA JOINT RURAL HIGH SCHOOL DISTRICT No. 2, WILLIAM H. HELTON and WAYNE LAHEY,
Appellants,

vs.

THE GRANT COUNTY PLANNING BOARD AND ADEL THROCKMORTON, State Superintendent of Public Instruction,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF KANSAS.

MOTION TO DISMISS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 1374

BOARD OF SATANTA JOINT RURAL HIGH SCHOOL DISTRICT No. 2, WILLIAM H. HELTON and WAYNE LAHEY,
Appellants,

vs.

THE GRANT COUNTY PLANNING BOARD AND ADEL THROCKMORTON, State Superintendent of Public Instruction,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF KANSAS.

MOTION TO DISMISS

Appellees move to dismiss on the grounds that the federal question sought to be reviewed was not timely raised or expressly passed on below and that the question presented is so unsubstantial as not to need further argument.

QUESTION PRESENTED

Where a state legislature, consistently with state constitutional provisions, delegates to a state official the final responsibility for fixing school district boundaries, does a provision that an election within a particular area as to which district it should be attached shall be advisory only deny electors in that area due process of law?

STATEMENT

The 1963 session of the Kansas legislature, by enacting the statute here involved,[1] attempted a sweeping revision of entire school system of the state. Its object was to reduce the number of districts and provide a uniform corporate form, with each district offering both elementary and high school grades.

Previous efforts to accomplish this aim in 1945 and 1961 had met with failure because the acts involved left the final determination of school district boundaries to local planning boards. The Kansas court viewed this as an unconstitutional delegation of legislative power. *State ex rel.* v. *Hines,* 163 Kan. 300, 182 P.2d 865 (1947); *School District, Joint No. 71* v. *Throckmorton,* 189 Kan. 590, 370 P.2d 89 (1962).

Taking the lessons of those cases to heart, the legislature in its 1963 act left the final decision in all instances to the State Superintendent of Public Instruction. In so doing, the legislature relied on *State ex rel.* v. *Storey,* 144 Kan. 311, 58 P.2d 1051 (1936), where the Kansas court had held that under the Kansas Constitution, Art. 6, §1, the

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1. Kan. Sess. Laws 1963, Ch. 393, now Kan. Stat. Ann. 72-6734 through 72-6763 as amended by Kan. Sess. Laws 1965, Ch. 410 and Ch. 420. The pertinent portions are reproduced as Appendix C to the Jurisdictional Statement.

state superintendent occupies a unique position among executive officers in that legislative authority in school matters may be delegated to him even without standards. This reliance proved well founded when the 1963 act was upheld in *Tecumseh School District* v. *Throckmorton*, 195 Kan. 144, 403 P.2d 102 (1965).

In harmony with this general scheme, recommendations of local (county) planning boards as to district boundaries were required to receive unconditional approval of the state superintendent before being submitted to an election.[2] Petitions for the creation of districts in areas where planning board proposals failed at the polls were required to receive similar approval.[3]

The transfer of a so-called "gray-area" from one planning unit to another under K.S.A. 72-6743 was to be accomplished after an election to determine "whether it is the desire" of the electors that it be transferred, followed by a determination of the "advisability" of the transfer by the two planning boards, and finally subject to the "approval thereof" by the state superintendent.

Here, as the court below noted (195 Kan. at 642), the vote in the 15 square mile gray-area in question was 52 in favor of the transfer to 44 opposed. One board found the transfer desirable, one did not. For reasons set forth in the opinion below, the state superintendent refused to transfer the territory. The trial court held such action to be within his authority, and the Kansas Supreme Court affirmed.

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2. K.S.A. 72-6746.
3. *Ibid.*

The Federal Question Was Not Timely Raised or Expressly Passed on Below

Although appellants in their petition referred on three occasions to "due process," none of the references were aimed at the statute as construed. Paragraph 14 (R. p. 11) of the petition alleged that the entry of the order of the state superintendent was without notice and hearing. Paragraph 23 (R. p. 13) alleged that by approving the recommendations of the Grant County planning board the state superintendent had prejudged the controversy. Finally, paragraph 24 (R. pp. 13-14) alleged an effort on the part of the state superintendent to "usurp the constitutional prerogatives of the legislature," and that his actions "constitute a denial of due process of law to your petitioners contrary to the constitution of the State of Kansas."

In the hearing before the trial court (R. pp. 16-76) the United States Constitution was never mentioned. The Kansas Supreme Court made passing mention of appellants' reference to "due process" (195 Kan. at 643), but the opinion was devoted to the main questions raised by appellants' argument, i.e., whether the statute contemplated that the election be advisory only and, if so, whether it violated the separation of powers doctrine inherent in the Kansas constitution.

The Question Presented Is Not Substantial

Appellants' contention is that a state legislature cannot avail itself of an advisory election in determining municipal boundaries. This novel proposition is wholly unsupported by authority.

To support a claim of denial of due process, appellants must first demonstrate some right of which they have been deprived. Yet it cannot seriously be urged that the individual appellants had a right to an election on the

boundary change, or that they or the appellant school district had a vested right in the continued existence of its boundaries.

This case falls squarely within the doctrine of *Hunter* v. *City of Pittsburgh*, 207 U.S. 161 (1907) and *Laramie County* v. *Albany County*, 92 U.S. 307 (1875), that a state has power unlimited by the United States Constitution to organize, alter or destroy its political subdivisions. The issue presented in *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960), is not present here, nor are the other exceptions to the doctrine noted in that case. That the doctrine is applicable to school districts is illustrated by *Kies* v. *Lowrey*, 199 U.S. 233 (1905).

Since appellants had no right to an election, they cannot complain that the one held was advisory. Perhaps the closest analogy is to the advisory jury. Like elections, the jury trial is a basic element of our system of government. Yet in those cases where a jury is not a matter of right, it may be invoked in an advisory capacity and its verdict may be disregarded by the court. *Kohn* v. *McNulta*, 147 U.S. 238 (1893); *Idaho and Oregon Land Improvement Co.* v. *Bradbury*, 132 U.S. 509 (1889). Compare Fed. R. Civ. P. 39(c)

CONCLUSION

For the foregoing reasons it is respectfully submitted that this appeal should be dismissed.

Respectfully submitted,

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